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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL

In the Matter of	)	
	)	
Application of SBC Communications	)	
Inc. et al. Pursuant to Section 271 of the	)	
Telecommunications Act of 1996 to	)	CC Docket No. 97-121
Provide In-Region, InterLATA	)	
Services in the State of Oklahoma	)	
	)	

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EVALUATION OF THE UNITED STATES DEPARTMENT OF JUSTICE

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Summary of Evaluation

SBC Communications Inc.'s application to provide in-region interLATA service in Oklahoma should be denied because SBC has failed to satisfy the requirements of Section 271 of the Telecommunications Act of 1996.

In enacting the Telecommunications Act of 1996, Congress sought to open all telecommunications markets to competition. This objective is particularly important in local markets, which historically have been monopolies. At present, the Bell Operating Companies control about three-quarters of all local exchange and access traffic in the United States.

Section 271 of the 1996 Act conditions Bell Operating Company ("BOC") entry into in-region interLATA service on a showing that the BOC's local market is open to competition. Specifically, the 1996 Act requires that before a BOC may be authorized to provide in-region interLATA services, the Federal Communications Commission must find that a BOC: (1) has fully implemented approved access and interconnection agreements with one or more facilities-based local competitors serving business and residential subscribers, or, in certain limited circumstances, has an approved or effective statement of generally available terms; (2) provides or generally offers the fourteen items on the statutory "competitive checklist"; (3) satisfies the requirements of Section 272, including the establishment of a separate long distance subsidiary and the satisfaction of nondiscrimination conditions; and (4) has demonstrated that in-region interLATA entry would be in the public interest. The 1996 Act further requires that, in making this determination, the FCC consult with the Department of Justice and give "substantial weight"

to its assessment of the BOC's application for in-region interLATA entry.

SBC's application for interLATA authority in Oklahoma falls short on several grounds, a point underscored by the lack of competitive entry into that state, despite the interest of potential competitors in entering the local telephone markets. As a threshold matter, SBC fails to meet the prerequisites of Section 271(c)(1) so as to be able to satisfy either of the two alternative statutory entry tracks. Having received requests for access and interconnection by qualifying potential facilities-based competitors, SBC cannot proceed under Track B. Although these requests require that SBC's application be evaluated under the standards of Track A, SBC cannot presently satisfy Track A because SBC is not "providing access and interconnection" to any facilities-based carrier competing with it for both business and residential customers.

Even if SBC were entitled to proceed under either Track A or Track B, it still could not obtain approval under Section 271 because it also has not fully satisfied the competitive checklist. Specifically, SBC has failed to: (1) provide adequate wholesale support processes, which enable a competitor to obtain and maintain required checklist items such as resale services and access to unbundled elements; and (2) provide (a) physical collocation, and (b) adequate interim number portability.

Finally, granting SBC's entry would not be consistent with the public interest. In evaluating an application in this regard, the Department seeks to determine whether the BOC's local markets have been irreversibly opened to competition. The Department believes that the most probative indicator of whether a local market is open to competition is the history of actual

commercial entry. This does not mean that BOC interLATA entry must be delayed until local competition is sufficiently vigorous to discipline the BOC's market power. Actual local entry with successful commercial usage of the BOC's wholesale support systems may be sufficient to demonstrate that the inputs competitors need are commercially available. Such entry also permits the formulation of performance benchmarks that will enable regulators and competitors to detect and constrain potential BOC backsliding and competitive misconduct after long distance entry. As of yet, however, there is no sufficient history of such entry in Oklahoma and our inquiry suggests that several significant obstacles to such competitive entry remain in place.

Based on our assessment of the market conditions in Oklahoma, we conclude that the current lack of entry does not reflect an absence of demand for new entrants or a lack of interest on the part of those planning to enter into the local markets in Oklahoma; numerous potential competitors -- facilities-based and otherwise -- have sought access and interconnection agreements with SBC. Rather, our assessment of market conditions reveals that competitors are being denied the opportunities for entry required and contemplated by the 1996 Act, in large part due to SBC's failure to provide what potential competitors have requested and need for effective entry. Accordingly, granting SBC's application for interLATA authority at this time -- before SBC has done its part to remove remaining obstacles to local competition and the necessary steps are taken to ensure that competition has the opportunity to develop -- would not be in the public interest.

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EVALUATION OF THE UNITED STATES DEPARTMENT OF JUSTICE

Introduction

The United States Department of Justice, pursuant to Section 271(d)(2)(A) of the Telecommunications Act ("1996 Act" or "Telecommunications Act"),[1] submits this evaluation of the application filed by SBC Communications Inc. ("SBC") on April 11, 1997 to provide in-region interLATA telecommunications services in the state of Oklahoma.[2] Congress granted the United States Department of Justice ("the Department"), the Executive Branch agency primarily

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[1] Pub. L. No. 104-104, 110 Stat. 56 (1996)(codified at 47 U.S.C. § 151 et seq.).

[2] Section 271(d)(2)(A) requires the Commission to consult the Attorney General on any Bell Operating Company ("BOC") application to provide in-region interLATA services under Section 271(c)(1) of the Telecommunications Act and also requires that the Commission give any written evaluation by the Attorney General "substantial weight" in its decision.

responsible for protecting competition,[3] a significant statutory role in overseeing the BOC interLATA entry process under the Telecommunications Act and helping to ensure that the timing of BOC interLATA entry furthers, and does not impede, the competition in all telecommunications markets that the 1996 Act seeks to promote.

SBC's application fails to satisfy the requirements of Section 271. Stated simply, SBC's application for interLATA authority in Oklahoma does not satisfy the statutory criteria and the Act's underlying objective of ensuring that local markets are open to competition. SBC's application, therefore, is premature.

In Part I of this evaluation, the Department describes the statutory framework of the 1996 Act. In Part II, the Department explains why SBC has failed to comply with either of the two entry tracks established in Section 271(c)(1). Part III then discusses several areas in which SBC has failed to satisfy the competitive checklist. Finally, Part IV reviews SBC's application under the public interest standard, focusing on the competitive environment in local telecommunications in Oklahoma and the reasons why competition has not yet developed there.[4]

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[3] The submission of this evaluation does not affect the independent enforcement responsibilities of the Department under the antitrust laws. See, e.g., United States v. R.C.A., 358 U.S. 334, 350 n.18 (1959). See also Section 601(b) of the 1996 Act, 110 Stat. 143.

[4] The Department's discussion of particular areas of noncompliance in this evaluation does not necessarily mean that we believe that those requirements not discussed have been satisfied.

I. The Requirements of Section 271 and the Competitive Objectives of the Telecommunications Act

Congress' objective in the 1996 Act was to truly and fully open all telecommunications markets to competition. Through Sections 251, 252, and 253, among others, Congress sought to remove the legal and economic barriers to competition in local exchange and access markets. In Section 271, Congress set forth the conditions under which the Bell Operating Companies ("BOCs") would be permitted to provide in-region interLATA services.

Section 271 reflects a Congressional judgment that competition in interLATA markets could be enhanced by allowing the BOCs to enter those markets. The significant growth in long distance competition since the breakup of the integrated Bell system has produced greater service innovation, improvements in quality, and downward pressure on prices.[5] InterLATA markets

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[5] The Commission has found that interLATA markets are sufficiently competitive to permit substantial deregulation. The Commission concluded in 1995 that "most major segments of the interexchange market are subject to substantial competition today, and the vast majority of interexchange services and transactions are subject to substantial competition." Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order, 11 FCC Rcd 3271, 3288, at ¶ 26 (rel. Oct. 23, 1995). It has repeated the conclusion that the market for interLATA telecommunications services is "substantially competitive" in decisions subsequent to the passage of the Telecommunications Act. Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order, CC Docket No. 96-149, FCC 96-489 ("Non-Accounting Safeguards Order"), at ¶ 62 (rel. Dec. 24, 1996); Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, Second Report and Order, CC Docket No. 96-61, FCC 96-424, at ¶¶ 21-22 (rel. Oct. 31, 1996). The Commission has found that "market forces will generally ensure that the rates, practices and

remain highly concentrated and imperfectly competitive, however, and it is reasonable to conclude that additional entry, particularly by firms with the competitive assets of the BOCs, is likely to provide additional competitive benefits.[6] See Affidavit of Dr. Marius Schwartz ("Schwartz Aff.") ¶¶ 7, 35, 90-98, Exhibit C to this Evaluation.

But Section 271 reflects Congressional judgments about the importance of opening local telecommunications markets competition as well. The incumbent local exchange carriers ("LECs"), broadly viewed, still have virtual monopolies in local exchange services and switched access, and dominate other local markets as well.[7] Taken together, the BOCs have some three-

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classifications [of interexchange carriers] are just and reasonable and not unjustly and unreasonably discriminatory." Policy and Rules Concerning the Interstate, Interexchange Market, Implementation of Section 254(g) of the Communications Act of 1934, as amended, Second Report and Order, CC Docket No. 96-61, FCC 96-424, at ¶ 21 (rel. Oct. 31, 1996). The Commission has also rejected arguments that "current levels of competition are inadequate to constrain AT&T's prices," finding that "AT&T cannot unilaterally exercise market power." Id. at ¶ 12. See also Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order, 11 FCC Rcd 3271 (1995).

[6] In 1995, according to the Commission's long distance market share statistics, AT&T had a market share of 53%, MCI 17.8%, Sprint 10%, LDDS 5%, and all other long distance carriers 14% (each individually about 1% or less) based on revenues. Federal Communications Commission, Statistics of Communications Common Carriers ("FCC 1996 Common Carriers Statistics"), at Table 1.4 (1996). Based on these shares, the Herfindahl-Herschman Index (HHI) for aggregated interLATA services nationwide was approximately 3272 in 1995, placing it well within the concentrated range. See U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, § 1.5 (1992). The HHI has dropped very substantially from its level of 8130 at the time of divestiture of the Bell System in 1984.

[7] The Commission's most recent analysis for 1995 estimates that LECs nationwide have 99.6% of local exchange services, 97% of local private line, and 97.5% of other local services, as well as 98.5% of interstate and intrastate access services. Federal Communications Commission, Telecommunications Industry Revenue: TRS Fund Worksheet Data ("FCC 1996 TRS Data"), at Table 2 (Dec. 1996). The Commission noted in its Notice of Proposed

quarters of all local revenues nationwide, and their revenues in their local markets are twice as large as the net interLATA market revenues in their service areas.[8] Accordingly, more

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Rulemaking in Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 14171, ¶ 6, n.13 (rel. Apr. 19, 1996), that the competitive access provider revenues of $1.15 billion in 1995 still represented "a de minimis portion of the market." While the evidence available to the Department indicates that there has been more competitive entry and growth of existing competitors at the local level in 1996, thanks largely to the Telecommunications Act, it also indicates that the overall local market share of the BOCs and other incumbent LECs has not changed over the past year to any competitively significant extent. Total revenues of competitive local exchange carriers (CLECs) and competitive access providers (CAPs) in 1996 have been estimated at only $2.2 billion, about 2% of the total revenues of the BOCs and other LECs. Competitors in local exchange services and switched access still have nationwide revenue shares of well under 1%. In dedicated access services, competitors' nationwide revenue share has been estimated at about 10%, though this is concentrated heavily in urban areas. In intraLATA toll, the LECs have lost about 25% of total revenues nationwide to competitors, primarily interexchange carriers. This competition has been stimulated by the introduction of 1+ dialing parity in sixteen states, but is very uneven on a state-by-state basis. See Schwartz Aff. ¶¶ 30-34, 38-39, 89 and Table 1.

[8] According to the Commission's common carrier statistics, in 1995 gross long distance revenues were $72.45 billion, but long distance revenues net of the $22.55 billion in access charges paid to reporting local carriers were $49.9 billion. In contrast, according to the same statistics, in 1995 all reporting incumbent local exchange carriers ("LECs), including the BOCs, had a total of (1) $46 billion in local exchange service revenues, including basic switched and private line revenues and some vertical services (of which over $37 billion was accounted for by BOCs), (2) $29 billion in exchange access revenues (of which over $22 billion was accounted for by the BOCs), (3) $10.7 billion in intraLATA toll and miscellaneous long distance revenues (of which over $8.1 billion was accounted for by the BOCs), and (4) $10.2 billion in miscellaneous revenues ($7.2 billion for the BOCs), most of which came from directory services, carrier billing and collection and nonregulated activities. The reporting LECs had $95.6 billion in gross revenues, of which $86 billion came from the three most important broad categories of local services they provide. The BOCs' gross revenues were over $74.8 billion, of which the great majority, over $67 billion, came from local exchange services, access and intraLATA toll. FCC 1996 Common Carrier Statistics at Table 2.9. The Commission's estimates of the LECs' revenues are slightly higher in another analysis, which includes the smaller LECs and puts total LEC revenues in excess of $100 billion. FCC 1996 TRS Data at Tables 18 and 19. For an analysis of local and long distance revenues in 1995, see Schwartz Aff. Table 1.

considerable benefits could be realized by fully opening these local markets to competition. See Schwartz Aff. ¶¶ 38-39. Moreover, we anticipate that there will be significant benefits from enabling not only the BOCs, but also interexchange carriers and other firms all to be able to realize the full advantages of vertical integration into all markets, as the Commission also has recognized, and the 1996 Act is designed to make such integration possible.[9] See Schwartz Aff. ¶¶ 7, 82-88.

Section 271 reflects Congress' recognition that the BOCs' cooperation would be necessary, at least in the short run, to the development of meaningful local exchange competition, and that so long as a BOC continued to control local exchange markets, it would have the natural economic incentive to withhold such cooperation and to discriminate against its competitors. Accordingly, Congress conditioned BOC entry on completion of a variety of steps designed to facilitate entry and foster competition in local markets. These statutory prerequisites to interLATA entry ensure that the BOCs have appropriate incentives to take the steps needed to open their monopoly markets, while reducing their incentives and opportunities to abuse their position in the market, i.e., disadvantaging competitors who are dependent on non-discriminatory access to the local exchange network, both for local services and for integrated local and long

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[9] Non-Accounting Safeguards Order at ¶ 7; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket Nos. 96-98 and 95-185, FCC 96-325, at ¶ 4 (rel. Aug. 8, 1996) ("Local Competition Order")("under the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications -- the local exchange and exchange access markets -- to competition is intended to pave the way for enhanced competition in *all* telecommunications markets, by allowing all providers to enter all markets").

distance services. In particular, Congress carefully structured the four, inter-related prerequisites for BOC entry to ensure both (1) that the BOCs would have appropriate incentives to cooperate with competitors who wished to enter local markets, and (2) that BOC entry into interLATA markets would not be held hostage indefinitely to the business decisions of the BOCs' competitors. Thus, rather than allowing for immediate entry or entry at a date certain, Congress chose to accept some delay in achieving the benefits of BOC interLATA entry in order to achieve the more important opening of local markets to competition.

Section 271 establishes four basic requirements for long distance entry.[10] The first three such requirements -- satisfaction of the requirements of Section 271(c)(1)(A) ("Track A") or Section 271(c)(1)(B) ("Track B"), the competitive checklist, and Section 272 -- establish specific, minimum criteria that a BOC must satisfy in all cases before an application may be granted. In

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[10] Specifically, Congress required a BOC to show that:

(A) the petitioning Bell operating company has met the requirements of subsection (c)(1) of this section and -

(i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A) of this section, has fully implemented the competitive checklist in subsection (c)(2)(B)of this section; or

(ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B) of this section, such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B) of this section;

(B) the requested authorization will be carried out in accordance with the requirements of section 272 of this title; and

(C) the requested authorization is consistent with the public interest, convenience, and necessity.

47 U.S.C. § 271 (d)(3)(1997).

addition, Congress imposed a fourth requirement, calling for the exercise of discretion by the Department of Justice and the Commission. The Department is to perform a competitive evaluation of the application, "using any standard the Attorney General considers appropriate." 47 U.S.C. § 271(d)(2)(A)(1997) (emphasis added). And, in order to approve the application, the Commission must find that "the requested authorization is consistent with the public interest, convenience, and necessity." 47 U.S.C. § 271(d)(3)(C)(1997). In reaching its conclusion on a particular application, the Commission is required to give "substantial weight to the Attorney General's evaluation." 47 U.S.C. § 271(d)(2)(A)(1997).

II. SBC's Application Does Not Satisfy the Preconditions of Section 271(c)(1)(A) or (B)

Section 271(c)(1) of the 1996 Act requires the BOC seeking authority to provide in-region interLATA services to meet the requirements of subparagraph (A) ("Track A") or subparagraph (B) ("Track B"). SBC contends that it meets the standards of both tracks. It claims to have satisfied Track A based on an approved interconnection agreement with a facilities-based operational provider, Brooks Fiber. At the same time, SBC claims that it has satisfied Track B on the basis of its Statement of Generally Available Terms ("SGAT"), which the Oklahoma Corporation Commission ("OCC") allowed to take effect by lapse of time for review under the 1996 Act, without approving it. In our view, based on the facts presented, SBC's application can *qualify* only for Track A consideration, not Track B.[11] Further, as SBC

[11] Or, as OCC Administrative Law Judge Goldfield put it, even though Brooks Fiber, the one provider relied on by SBC under Track A, was not yet furnishing facilities-based residential service in Oklahoma, it was a "qualifying, facilities-based carrier under subsection (c)(1)(A) for

has failed to *satisfy* Track A's entry requirements, SBC's application should be denied.

A. The Standards of Track A Govern SBC's Application

Track A reflects Congress' judgment that, in most circumstances, a BOC should not be permitted to provide in-region interLATA service until it "is providing access and interconnection," pursuant to binding agreements approved under Section 252, to "one or more unaffiliated competing providers of telephone exchange service ... to residential and business subscribers."[12] Section 271(c)(1)(A). As the Conference Report makes clear, the access and interconnection agreements must have been implemented, and the competing provider(s) must be "operational." H.R. Conf. Rep. No. 104-458, at 148 (1996). Both residential and business customers must be served by one or more facilities-based providers[13] in order for the BOC to satisfy Track A's entry requirements. While each qualifying facilities-based provider need not be

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the purpose of foreclosing a Track B application." Report and Recommendations of the Administrative Law Judge, OCC Cause No. PUD 97-64, at 35 (Apr. 21, 1997) ("ALJ Report") (emphasis added). Similarly, the Oklahoma Attorney General concluded that Track B has been foreclosed. See Comments of the Oklahoma Attorney General Regarding the Issues raised in ALTS' Motion to Dismiss, CC Docket No. 97-121, at 6-8 (Apr. 23, 1997). One OCC Commissioner reached the same conclusion, while the other two refrained from deciding the issue.

[12] An exchange access provider, exchange service reseller, or cellular carrier does not satisfy Track A. H.R. Conf. Rep. No. 104-458, at 148 (1996).

[13] "For the purpose of this subparagraph [Track A], such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier." Section 271(c)(1)(A).

serving both types of customers if the BOC is relying on multiple providers, it necessarily follows that if the BOC is relying on a single provider it would have to be competing to serve both business and residential customers.

Congress understood that requiring operational facilities-based competition pursuant to binding agreements approved under Section 252 would impose some delay on BOC entry into in-region interLATA services. But a fundamental premise of the 1996 Act is that the development of local exchange competition will require opening up the possibilities for access and interconnection to the BOC's local network. See S. Rep. No. 104-23, at 5 (1995). The approach of Track A, making the BOCs' ability to provide interLATA services dependent on the presence of an implemented agreement with an operational competitor, serves Congress' purpose of fostering local exchange competition by providing a strong incentive for the BOC to work with potential competitors to facilitate their entry. And, as the Conference Report notes, the presence of an operational competitor actually using the checklist elements is important in assisting the state commission and the FCC in determining, for purposes of Section 271(d)(2)(B), that the BOC has fully implemented the checklist elements set out in the Section 271(c)(2) checklist. H.R. Conf. Rep. No. 104-458, at 148 (1996).[14]

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[14] As SBC notes in its Opposition to ALTS' Motion to Dismiss, Congress rejected proposals to require the BOCs to wait until various "metric" tests of the substantiality of the competition were satisfied. Opposition of Southwestern Bell to ALTS' Motion to Dismiss and Request for Sanctions, CC Docket No. 97-121 ("SBC Opposition to ALTS' Motion"), at 5-7 (Apr. 28, 1997). But Congress was clear that there must be some operational facilities-based competition for business and residential subscribers under Track A.

The approach that is now embodied in Track A was the only path to approval of in-region interLATA services for the BOCs in the Senate bill.[15] The House Committee's Report confirms its concurrence in this approach, emphasizing that "[t]he Committee expects the Commission to determine that a competitive alternative is operational and offering a competitive service somewhere in the State prior to granting a BOC's petition for entry into long distance." H.R. Rep. No. 104-204, pt. 1, at 77 (1995).

The House, however, added a new provision, which ultimately became Track B.[16] The Conference Report explains that this provision was designed "to ensure that a BOC is not effectively prevented from seeking entry into the interLATA services market simply because no facilities-based competitor that meets the criteria set out in [Track A] has sought to enter the market." H.R. Conf. Rep. No. 104-458, at 148 (1996). For, if Track A were the only entry path available, a BOC could find itself permanently barred from providing in-region interLATA services simply because no competitor wished to provide the kind of facilities-based business and residential competition that would satisfy Track A.

In short, Track B provides a limited exception to the Track A requirement of operational competition under an approved and implemented agreement "if, after 10 months after enactment of the Act no such provider has requested the access and interconnection described in

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[15] See Sections 255(b)(1) and (c)(2)(B) of S. 652, reproduced at S. Rep. 104-23, at 97-99 (1995).

[16] See Section 245(a)(2) of H.R. 1555, reproduced at H.R. Rep. No. 104-204, pt. 1, at 7 (1995).

subparagraph (A) before the date which is three months before the date [of the BOC application]." Section 271(c)(1)(B). A BOC may also proceed under Track B if the State commission certifies that the only such providers requesting access and interconnection have unreasonably delayed the process by failing to negotiate in good faith as required by Section 252, or by failing to comply, "within a reasonable period of time," with the implementation schedule contained in an agreement approved under Section 252. Id. To satisfy Track B's entry requirements, the BOC must provide "a statement of terms and conditions that [the BOC] generally offers to provide such access and interconnection" (the "SGAT"), which must be "approved or permitted to take effect by the State commission under section 252(f)" in lieu of the binding and implemented agreements required by Track A.

Because Track B was added to deal with the possibility that a BOC, through no fault of its own, could find itself barred indefinitely from satisfying Track A, the term "such provider" in Track B should be interpreted with reference to the type of facilities-based competition that would satisfy Track A. Accordingly, we do not agree with the suggestion by the Telecommunications Resellers Association[17] that a BOC is foreclosed from proceeding under Track B if it has received requests for access and interconnection but only from firms seeking to provide services that would not satisfy Track A, such as a carrier that does not plan to provide

[17] In its Comments on ALTS' motion to dismiss SBC's application, the Telecommunications Resellers Association stated that a request by a competing carrier can preclude entry under Track B even if that carrier does not intend "to provide services `either exclusively . . . or predominantly over . . . [its] own telephone exchange facilities." Comments of the Telecommunications Resellers Association, CC Docket No. 97-121, at 7 (Apr. 28, 1997).

service either exclusively or predominantly over its own facilities. See H.R. Rep. No. 104-204, pt. 1, at 77 (1995).[18]

But, contrary to SBC's contention, a BOC is not entitled to proceed under Track B simply because firms requesting interconnection and access for the purpose of providing services that would satisfy the requirements of Track A are not already providing those services at the time of the request. Such an interpretation of Section 271 would radically alter Congress' scheme, expanding Track B far beyond its purpose and, for all practical purposes, reading the carefully crafted requirements of Track A out of the statute. Similarly, as discussed below, a requesting potential facilities-based carrier need not even have fulfilled all of Track A's requirements at the time of the BOC's Section 271 application to foreclose the BOC from proceeding under Track B, as Congress understood that some time would be necessary before an agreement would be fully implemented and a provider would become operational.

If SBC's interpretation of Track B were correct, Track B would no longer be a limited exception applicable where a BOC would otherwise be foreclosed indefinitely from entry into in-region interLATA markets. Rather, Track B would become the standard path, allowing BOCs to seek authorization to provide in-region interLATA services even if no Section 252 agreement to

[18] Since Track A, contrary to ALTS' suggestion, does not require each separate facilities-based competitor to be providing both residential and business service as long as both residential and business subscribers are being served by some facilities-based provider, it also follows that Track B can be foreclosed even if each separate provider requesting access and interconnection does not intend to provide both residential and business services, if the requesting providers as a group satisfy that requirement.

provide access and interconnection to the local network had been successfully implemented, despite would-be facilities-based competitors' timely efforts. To accept SBC's position, one would have to assume that Congress enacted Track A solely to deal with two situations of narrowly limited significance: (1) where a BOC application is filed less than ten months after enactment; or (2) where a competitor has managed to begin providing facilities-based local exchange services to residential and business customers more than three months before the BOC applies under Track B, which the BOC may do as early as ten months after enactment of the statute. There is no basis for the assumption that Congress intended Track A, the only track included in the bill as originally passed by the Senate, to play such an insignificant role.

On the contrary, Congress well understood that few, if any, would-be facilities-based competitors to the BOCs would be likely to negotiate, obtain state approval, and fully implement agreements providing for access and interconnection, and begin offering services satisfying Track A, all in the seven months (ten months less the three-month window) immediately following enactment of the statute. Indeed, Congress expected that many potential competitors would not even make their requests until the FCC's implementing rules were promulgated, within six months of enactment. See H.R. Conf. Rep. No. 104-458, at 148-49 (1996). Congress allowed state commissions 90 days to review and approve negotiated agreements, while allotting nine months for completion of arbitrations, and a further 30 days for review and approval of an arbitrated agreement. For a potential competitor merely to have an approved agreement in hand would have taken at least the full ten months after passage of the 1996 Act if arbitration were

necessary, even if the potential competitor had made its request promptly after the 1996 Act became law. Moreover, implementation of such an agreement is far from automatic; even if the BOC and competing provider cooperate fully, technical issues will inevitably impose some delay to full implementation.[19]

Nor is there reason to believe that Congress expected that any significant number of facilities-based competitors would be providing service to residential and business customers without an implemented agreement for interconnection and access. To the contrary, the 1996 Act was premised on Congress' understanding that, at least in the short run, such agreements will normally be an essential prerequisite to effective local exchange service competition.[20] Or, as the Wisconsin Public Utilities Commission aptly put it, "[i]t is not logical to expect facilities-based

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[19] SBC argues that a facilities-based competitor might have negotiated an interconnection agreement with the incumbent BOC and become operational prior to enactment of the 1996 Act. Such a competitor could request interconnection under the 1996 Act, "thereby allowing 'immediate' interLATA entry by the Bell company under the A Track." SBC Opposition to ALTS' Motion at 16. SBC provides no reason to believe that Congress expected such situations to be common, however. Based on the Department's experience with the implementation of the Telecommunications Act nationwide, only a small minority of states had any local exchange competition before the 1996 Act was passed, and very few providers had become operational. Indeed, the Conference Report cites only one facilities-based provider that had obtained an interconnection agreement to provide local services before the 1996 Act was passed, Cablevision in New York. H.R. Conf. Rep. No. 104-458, at 148 (1996).

[20] SBC suggests that a facilities-based competitor might have provided "limited types of local service to business and residential customers completely over its own network" before requesting interconnection. SBC Opposition to ALTS' Motion at 17. Once again, it suggests no reason to believe that Congress thought that this would often be the case. The Department is not aware of any provider other than the ILECs that had a significant facilities-based telephone local exchange network of its own in the United States, sufficiently ubiquitous to dispense with interconnection with the BOCs, before the 1996 Act was passed.

competition prior to interconnection being available." Findings of Fact, Conclusions of Law and Order, Matters Relating to Satisfaction of Conditions for Offering InterLATA Service (Wisconsin Bell Inc. d/b/a Ameritech Wisconsin), Wisconsin Public Service Commission, Docket No. 6720-TI-120 at 15 (Dec. 12, 1996). In sum, reading the phrase "such provider" in Track B to require not only that the firm be seeking to provide services that would satisfy Track A, but also that it already be providing them, would essentially read Track A out of the statute.

The legislative history confirms that Congress intended no such result. To the contrary, Congress assumed that firms would not yet be operational competitors when they requested the interconnection and access arrangements necessary to enable them to compete. Thus, for example, the Conference Committee described Track B as ensuring that a BOC is not foreclosed from seeking entry "simply because no facilities-based provider that meets the criteria set out in new section 271(c)(1)(A) has sought to enter..." H.R. Conf. Rep. No. 104-458, at 148 (1996) (emphasis added). It emphasized the importance of the FCC promulgating rules implementing Section 251 within six months of the statute's enactment precisely so that "potential competitors will have the benefit of being informed of the commission rules in requesting access and interconnection before the statutory window in new section 271(c)(1)(B) shuts." Id. at 148-49 (emphasis added). Accord, H.R. Rep. No. 104-204, pt. 1, at 77-78 (1995) (The bill would "not create an unreasonable burden on a would-be competitor to step forward and request access and

interconnection" (emphasis added)).[21]

Congress fully appreciated the procompetitive potential of permitting the BOCs to provide in-region interLATA services, and it was sensitive to the BOCs' concerns that such entry not be unreasonably delayed. But Congress was also concerned with fostering local exchange competition. Under SBC's interpretation, Section 271(c)(1)(B) would reward the BOC that failed to cooperate in implementing an agreement for access and interconnection and thereby prevented its competitor from becoming operational. Properly construed, however, the statute serves Congress' procompetitive purposes by affording the BOC a strong incentive to cooperate as would-be facilities-based competitors attempt to negotiate agreements and become operational.

Track B appropriately safeguards the BOCs' interests where there is no prospect of facilities-based competition that satisfies Track A, either because no competitor desires to provide it or because competitors cannot or will not move toward full implementation of a Section 252 agreement in a timely fashion. But Track B does not represent congressional abandonment of the fundamental principle, carefully set forth in Track A, that a BOC may not begin providing in-region interLATA services before there are operational facilities-based competitors in the local exchange market, if there are firms moving toward that goal in a timely

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[21] The legislative history that SBC cites in its Opposition to ALTS' Motion to Dismiss, at 14-15, is most reasonably understood as relating to the question whether the provider or providers requesting interconnection and access must be seeking to provide services that would qualify under Track A or whether, as ALTS argues, "such provider" may include firms seeking to provide pure resale or other services that could not ever be used to satisfy Track A.

fashion.

Given the sensible relationship between Track A and B set out above, SBC is clearly not entitled to proceed under Track B because it has received requests for interconnection and access from at least two qualifying providers, and the state commission has not certified that either delayed the negotiation or implementation process. Brooks Fiber ("Brooks") made its initial request for access and interconnection with SWBT in March 1996, and Cox Communications ("Cox") made its request on October 23, 1996, substantially more than three months before SBC's application was filed.[22]

Both Brooks and Cox have manifested their intent to be facilities-based competitors and are working toward that goal.[23] Both have substantial telecommunications facilities in place in one or both of the major metropolitan areas in Oklahoma, including switches and installed fiber, that they could use to provide service to business and residential consumers. Brooks is already providing facilities-based service to business customers in Oklahoma City and Tulsa, and its intent to enter the residential market is reflected by its tariff and ongoing internal test of residential resale. As SBC itself has noted, Brooks has already invested substantial resources,

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[22] Comments of Brooks Fiber Properties, Inc., in Support of Motion to Dismiss and Request for Sanctions by the Association for Local Telecommunications Services, CC Docket No. 97-121 ("Brooks ALTS' Motion Comments"), at 4-5 (Apr. 28, 1997); Comments of Cox Communications, Inc., CC Docket No. 97-121 ("Cox FCC Comments"), at 1 (May 1, 1997) and Declaration of Carrington Phillip ("Phillip Decl.") ¶3, attached to Cox FCC Comments.

[23] Brooks ALTS' Motion Comments at 4 n.7; Comments of Cox Communications, Inc. on Motion to Dismiss, CC Docket No. 97-121 ("Cox ALTS' Motion Comments"), at 1-2 (Apr. 28, 1997).